No. 89-78

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

AUDELIO ARZOLA-AMAYA,
EDWARD V. MAYNARD,
SANTIAGO ROSAS-ARZOLA,
and JORGE HUMBERTO SALAZAR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

CHARLES LOUIS ROBERTS
Attorney for Petitioner
Texas Bar No. 17000100
123 Mills, Suite 306
El Paso, Texas 79901
(915) 532-5475

EARL HANSON
Attorney for Petitioner
205 S. Broadway
Suite 902
Los Angeles, CA
(213) 626-6831

LUIS E. ISLAS
Attorney for Petitioner
Texas Bar No. 10435300
2915 Wyoming
El Paso, TX 79902
(915) 562-7111

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

56 pp

QUESTIONS PRESENTED

I. WHETHER THE FEDERAL COURTS SHOULD CONTINUE TO ADHERE TO THE REQUIREMENTS THAT A TRIAL COURT POLL A JURY AS TO EXPOSURE TO MID-TRIAL PUBLICITY AFTER A SHOWING OF PROBABLE EXPOSURE TO PREJUDICIAL PUBLICITY DURING TRIAL.

II. WHETHER DUE PROCESS AND THE RIGHT TO A FAIR TRIAL REQUIRES THAT A TRIAL COURT POLL A JURY AS TO EXPOSURE TO MID-TRIAL PUBLICITY AFTER A SHOWING OF PROBABLE EXPOSURE TO PREJUDICIAL PUBLICITY DURING TRIAL.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
CITATIONS TO OPINIONS BELOW 2
JURISDICTION 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS WHY THE WRIT SHOULD BE GRANTED 5
CONCLUSION AND PRAYER 20
APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

Mares v. United States, 383 F.2d 805, 808 (10th Cir. 1967) 10

Margoles v. United States, 407 F.2d 727 (7th Cir. 1969) 9, 12

Patterson v. Colorado, 205 U.S. 454 (1907) 6, 7

United States v. Akin, 562 F.2d 459, 468 (7th Cir. 1977) 11

United States v. Arzola-Amaya, 867 F.2d 1504 (5th Cir. 1989) 2, 3, 4, 5, 7, 8, 10, 11, 13, 15

United States v. Attell, 655 F.2d 703 (5th Cir. 1981) 11

United States v. Burr, 25 F.Cas. 49 (No. 14, 692g) (C.C.D.Va. 1807) 12

United States v. Hankish, 502 F.2d 71 (4th Cir. 1974) 9

United States v. Herring, 568 F.2d 1099 (5th Cir. 1978) 8, 14

United States v. Jones, 542 F.2d 186 (4th Cir. 1986) 18

United States v. Perrota, 553 F.2d 247 (1st Cir. 1977) 9

United States v. Pomponio, 517 F.2d 460, 463 (4th Cir.)., cert denied, 428 U.S. 1015, 96 S.Ct. 448, 46 L.Ed.2d 386 (1975) 10

United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972) 10, 19

United States v. Vento, 533 F.2d 838, 869 & n. 106 (3d Cir. 1976) 10

United States v. Williams, 809 F.2d 1072 (5th Cir. 1987) 11, 14

U.S. v. Williams, 568 F.2d 464 (5th Cir. 1978) 19

No. _____

In The

Supreme Court of the United States

October Term, 1988

AUDELIO ARZOLA-AMAYA,
EDWARD V. MAYNARD,
SANTIAGO ROSAS-ARZOLA,
and JORGE HUMBERTO SALAZAR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT PETITION FOR WRIT OF CERTIORARI

AUDELIO ARZOLA-AMAYA, EDWARD V. MAYNARD, SANTIAGO, ROSAS-ARZOLA, and JORGE HUMBERTO SALAZAR, Petitioners herein, by and through their attorneys of record, EARL HANSON, LUIS ISLAS, and, CHARLES LOUIS ROBERTS, hereby petition this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The denial of rehearing and rehearing en banc by the United States Court of Appeals for the Fifth Circuit in *United States v. Arzola-Amaya,* et al., No. 88-1108 was entered without opinion on May 15, 1989; and this *Order* is reproduced herein as Appendix B, pp. App. 31-32. The *Opinion* of the panel of the United States Court of Appeals for the Fifth Circuit in *United States v. Arzola-Amaya, et al.,* 867 F.2d 1504 (5th Cir. 1989) was entered as a published Slip Opinion on March 8, 1989, and is reproduced herein as Appendix A, pp. App. 1-30.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on May 15, 1989. This Petition is timely filed within sixty (60) days of May 15, 1989, pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The *United States Constitution,* Amend V and VI read in pertinent part:

> No person shall be . . . deprived of life, liberty, without due process of law; . . .
>
> ***U. S. Const.,* Amend V**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .
>
> ***U.S. Const.*, Amend VI**

STATEMENT OF THE CASE

On September 16, 1987, the Petitioners, Arzola-Amaya, Maynard, Rosas-Arzola and Salazar, were charged in the United States District Court for the Western District of Texas, El Paso Division, with various substantive and conspiracy counts dealing with the possession and distribution of marijuana and cocaine, 21 U.S.C. 841, 846, etc. (*R II 256, 274*). The Petitioner Arzola-Amaya was additionally charged with a continuing criminal enterprise count, 21 U.S.C. § 848 (*R II 256-274.*)

The Government alleged that the Petitioners in this case were part of a continuing criminal enterprise responsible for four (4) separate loads of cocaine seized in Pasadena, California, in May, 1985 (*R XXIX 68*), in Alamogordo, New Mexico, in July, 1985, and in El Paso, Texas, in July, 1985 (*R XXIX 69*). The final seizure for which the Petitioners were arrested involved 415.5 pounds of cocaine and 19 pounds of marijuana discovered in El Paso, Texas, on June 26, 1987 (*R XXIX 69-70*). A jury trial was held from November 30, 1987 to December 18, 1987. During that trial the Petitioners made "repeated requests to poll the jury regarding mid-trial publicity," but were rebuffed by the trial court, *Arzola-Amaya*, 867 F.2d at 1513.

The Fifth Circuit *Opinion* concedes that the Petitioners made "repeated requests to poll the jury," *Arzola-Amaya*, 867 F.2d at 1513. They made their Motions orally and in writing, (*R V 100 et seq*). The Petitioners reproduced copies of the offending articles and made them part of the record; (*see R V 55-56, 112-133, R VI 169-174*). The Petitioners photographed the display "vending machines surrounding the courthouse," etc. and further submitted a map of the locations of the machines (*R V 106-111*). The Petitioners even photographed the actual offending articles as they were actually displayed in the vending machines, (*R V 110-111*). The written motions (even aside from the articles themselves) specified the prejudicial off-the-record information, "articles which revealed the previous conviction of Edward Maynard for the Federal Offense of Racketeering involving a bribery scheme in El Paso Municipal Court", (*R V 100-101*). Following such trial, the Petitioner Arzola-Amaya was convicted of all counts submitted to the jury and sentenced to life imprisonment without parole. The Petitioner Maynard was acquitted of the substantive count but convicted of the conspiracy count and sentenced to ten (10) years imprisonment. The Petitioner Rosas-Arzola was acquitted of the substantive count, but convicted of the conspiracy count and sentenced to seven (7) years imprisonment. The Petitioner Salazar was convicted on all counts submitted to the jury and sentenced to twenty (20) years imprisonment.

A panel of United States Court of Appeals affirmed the judgment of the trial court on March 8, 1989, as to all Petitioners in *United States of America versus Arzola-Amaya*, 867 F.2d 1504 (5th Cir. 1989).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. WHETHER THE FEDERAL COURTS SHOULD CONTINUE TO ADHERE TO THE REQUIREMENTS THAT A TRIAL COURT POLL A JURY AS TO EXPOSURE TO MID-TRIAL PUBLICITY AFTER A SHOWING OF PROBABLE EXPOSURE TO PREJUDICIAL PUBLICITY DURING TRIAL.

II. WHETHER DUE PROCESS AND THE RIGHT TO A FAIR TRIAL REQUIRES THAT A TRIAL COURT POLL A JURY AS TO EXPOSURE TO MID-TRIAL PUBLICITY AFTER A SHOWING OF PROBABLE EXPOSURE TO PREJUDICIAL PUBLICITY DURING TRIAL.

A. This Court Should Grant Certiorari Because the Fifth Circuit Opinion Is Directly In Conflict With The Holdings Of Several Circuits As Well As With Its Own Prior Caselaw.

1. *In General:*

Simply put, this is a case where there was little if any pre-trial publicity, but a sudden "blitz," *Arzola*, 867 F.2d at 1513, of mid-trial publicity in part occasioned by the fact that trial testimony tied a prominent local political figure to the conspiracy who was coincidentally a defense counsel for one of the defendants on trial (*See R V 114-120*). The publicity involved articles which detailed the prior convictions of Petitioner Arzola and Petitioner Maynard, (*See R V 112, et seq.*). These prior convictions were never presented at trial, and were thus off the record. Petitioner Salazar was prejudiced to a lesser degree by incessantly repeated references to the off-the-record information that he was a "Colombian national," (*See R I 144-145; 146-147, 150, 151-152, 161, 164, 165, etc.*). Since "Colombia" is seen in the public imagination, if not reality, as the drug smuggling capital of the world, this

was highly prejudicial. Petitioner Rosas was prejudiced in a more general way by publicity in which investigative reporting resulted in newspaper articles which revealed off-the-record evidence of extraneous offenses and evidence which tended to confirm or support testimony of key government witnesses, (*See R I 146-147; 148-149, 157-158*). Defense counsel at trial made "repeated requests to poll the jury regarding mid-trial publicity," *Arzola*, 867 F.2d at 1513, and accompanied such request by: (1) written motions (*R V 100 et seq*); (2) copies of the articles (*R V 55-56, 112-133, R VI 169-174*); (3) pictures of the articles displayed in window display newspaper vending machines (*R V 110-111*); (4) pictures of the vending machines (*R VI 156-157*); and, (5) maps of the location of the vending machines demonstrating that such machines surrounded the courthouse (*R VI 156-157*). The summary of the facts by the Fifth Circuit adequately support these undisputed facts:

> Appellants contend on appeal that reversal is required because the District Court improperly denied their repeated requests to poll the jury regarding mid-trial publicity. For several reasons we do not agree.***From December 1, 1987, the first day of the trial, through December 15, 1987, a blitz of newspaper articles appeared on the front pages of the El Paso and Juarez newspapers. Headlines appeared on newspapers located in vending machines throughout the downtown area and surrounding the courthouse.
>
> ***Arzola*, 867 at 1513.**

Justice Holmes writing for the Court in *Patterson v. Colorado*, 205 U.S. 454 (1907) addressed the issue of publicity and a fair trial and declared:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."
>
> ***Patterson,* 205 U.S. at 462**

The Fifth Circuit opinion in *Arzola* basically holds that a routine cautionary instruction obviates any need to poll a jury regardless of whether an accused is able to show probable exposure and the prejudicial nature of mid-trial publicity. This published opinion holds:

> Appellants contend on appeal that reversal is required because the District Court improperly denied their repeated requests to poll the jury regarding mid-trial publicity. For several reasons we do not agree. * * * From December 1, 1987, the first day of the trial, through December 15, 1987, a *blitz* of newspaper articles appeared on the front pages of the El Paso and Juarez newspapers. Headlines appeared on newspapers located in vending machines throughout the downtown area and surrounding the courthouse. [Emphasis supplied]* * * . . . in the case now before the court, the trial court first inquired of the panel at general voir dire whether anyone had heard anything about the case through the news media. After it learned *that no one had,* the trial court went on to say, "if it suddenly dawns on you that you have heard about it . . . , well please go ahead and raise your hand and bring it up then." [Emphasis supplied].
>
> * * *
>
> The cautionary instructions were made on two separate occasions. The judge was very careful and very specific. These collective admonitions concerning media coverage were adequate safeguards to

ensure that appellants received a fair trial free from prejudice.

United States v. Arzola-Amaya, et al.,
867 F.2d 1513-1514.

In attempting to reach the goals expressed by Justice Holmes, the American Bar Association in its *Standard for Fair Trial and Free Press,* § 3.5(f) (1968) established the following guidelines and procedures to be utilized in such a situation:

> In cases of this sort, we fully approve the practice recommended by the American Bar Association.
>
> If it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and an accurate record of the examination shall be kept.

United States v. Herring,
568 F.2d 1099, 1104 (5th Cir. 1978)
Citing and recommending the *ABA Standards for Fair Trial and Free Press,* § 3.5(f) (1968).

Virtually every Federal Circuit has adopted similar standards which while not directly following the ABA standards do require a substantially identical procedure. The following are formulations of these adopted standards:

> Thus, the procedure required by this Circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors

who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the judge is not required to proceed further. We therefore find that the district court took adequate precautionary measures to protect petitioner's right to a fair trial.

Margoles v. United States,
407 F.2d 727, 735 (7th Cir. 1969)

Where the problem has arisen elsewhere, most of the affected circuits have held that the judge is required immediately to conduct some form of examination of the jurors to determine whether or not they have encountered the information – assuming, of course, the court is first satisfied that the information is genuinely prejudicial.***Like our sister circuits, we believe that when potentially prejudicial publicity has occurred to which jurors may have been exposed, and this fact is timely called to the court's attention, it must promptly take steps to ascertain "that the conclusions to be reached . . . will be induced only by evidence and argument in open court." We approve, as a general rule of practice to be observed in this circuit, the . . . formulation by the seventh circuit in *Margoles v. United States, supra.*

United States v. Perrota,
553 F.2d 247, 249-250 (1st Cir. 1977)

We agree with the Seventh Circuit that when highly prejudicial information may have been exposed to the jury, the court must ascertain the extent and effect of the infection, and thereafter, in its sound discretion, take appropriate measures to assure a fair trial. *Margoles v. United States,* 407 F.2d 727 (7th Cir. 1969)

United States v. Hankish,
502 F.2d 71, 77 (4th Cir. 1974)

See also: *United States v. Pomponio*, 517 F.2d 460, 463 (4th Cir.)., cert denied, 428 U.S. 1015, 96 S.Ct. 448, 46 L.Ed.2d 386 (1975); *United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972) and *Mares v. United States*, 383 F.2d 805, 808 (10th Cir. 1967); Cf. *United States v. Vento*, 533 F.2d 838, 869 & n. 106 (3d Cir. 1976).

Indeed, until the recent turnabout in *Arzola*, the Fifth Circuit itself adhered to the ABA Standards and required a polling of the jury upon a showing of probable exposure of a trial jury to prejudicial mid-trial publicity:

> Upon careful consideration, we conclude that our case more closely parallels *Herring* than *Harrelson*. Silva squarely moved for a voir dire of the jury members. It was reversible error for the trial court not to inquire of the possible contamination. We held in *Herring* that the district court
>
> > should have examined each juror separately, in the presence of counsel, to determine (1) how much contact the jury members had had with the damaging publicity and (2) how much prejudice to the defendant had resulted from that contact, assuming that any had occurred. For the present, we are unwilling to speculate on the extent of whatever prejudice existed; the point, however, is that since the district court did not question the jury members in order to ascertain the extent of that prejudice, we would have to speculate to conclude that undue prejudice did not exist. In the interests of justice, we must give the defendant the benefit of the doubt in this connection. The state of the record now before us permits no other action.
>
> *Herring*, 568 F.2d at 1106. The conviction of [the appellant] must be reversed and his case remanded for further proceedings on these grounds.

United States v. Williams,
809 F.2d 1072, 1093 (5th Cir. 1987)

This prior Fifth Circuit case conflicts directly with the holding in *Arzola,* that a routine cautionary instruction obviates any need to examine either exposure or prejudice, *Arzola,* 867 at 1514, because in *Williams* a routine cautionary instruction was given as well:

> The judge instructed the jury as follows:
>
> > . . . I anticipate there will be continued publicity about this case in the media. So I'm going to ask you one more time and remind you one more time of your commitment not to expose yourself to any extraneous matters, not to listen to anything on the T.V. about the case nor read anything about it in the newspapers. I'm confident you will comply with my instructions which will enable you to reach a verdict in this case based on what you hear in the courtroom. Record, vol. 23 at 228-29.
>
> ***Williams,* 809 F.2d at 1092, n.21**

See also: *United States v. Attell,* 655 F.2d 703 (5th Cir. 1981).

Actually, prior to the *Arzola* holding, the only conflict as to the procedures to be employed in a mid-trial publicity issue was whether the polling should be individual or collectively, see *United States v. Akin,* 562 F.2d 459, 468 (7th Cir. 1977) and the cases cited therein.

In summary, the Fifth Circuit's new found faith in routine cautionary instruction to successfully challenge an admitted "blitz" of publicity is in direct conflict with the holdings of virtually every other circuit as well as with its own prior holdings. For this reason, this Court should exercise its discretion and grant Certiorari.

B. Exercise Of This Court's Supervisory Powers Is Called For In This Case To Protect The Right Of A Fair Trial In Federal Court.

Even though publicity/fair trial problems have existed since the beginning of our republic,[1] it should be obvious to this Court as to any observer that the mass media of today with its instant villains and heros, etcetera is inexorably compounding the difficulty of guaranteeing jury impartiality in a high or "blitz" publicity case. This Court holds a supervisory responsibility over the Federal Courts to guarantee a fair trial to defendants in federal criminal trials. Given the ever-increasing deference we give to jury verdicts, it is imperative that the source of such decisions affecting liberty and even life be impartial. The polling of the jury under either the *ABA Standards* or *Margoles* is a reasonable method of seeking to preserve and guarantee that impartiality. For this reason, this Court should exercise its discretion and grant Certiorari.

C. In This Case, The Petitioners Established Probable Exposure to Prejudicial Pre-Trial Publicity And Thus Were Entitled To Have Their Requests To Poll The Jury Granted By the Trial Court.

Although these issues were never reached by the Fifth Circuit because of its holding that a routine cautionary instruction obviated the need to consider exposure and prejudice, the Petitioners would first demonstrate that the issue was properly raised and preserved below, and that both probable exposure and the prejudicial

---

[1] See *United States v. Burr*, 25 F.Cas. 49 (No. 14, 692g) (C.C.D.Va. 1807), Marshall, C.J. sitting as circuit judge.

nature of the publicity were amply demonstrated below even though the trial court denied the motion to poll without a hearing or even a discussion.

1. ***Preservation of Error:***

The Fifth Circuit *Opinion* concedes that the Petitioners made "repeated requests to poll the jury," *Arzola-Amaya*, 867 F.2d at 1513. They made their Motions orally and in writing, (*R V 100 et seq*). The Petitioners reproduced copies of the offending articles and made them part of the record; (*see R V 55-56, 112-133, R VI 169-174*). The Petitioners photographed the display "vending machines surrounding the courthouse," etc. .nd further submitted a map of the locations of the machines, (*R V 106-111*). The Petitioners even photographed the actual offending articles as they were actually displayed in the vending machines, (*R V 110-111*). The written motions (even aside from the articles themselves) specified the prejudicial off-the-record information, "articles which revealed the previous conviction of Edward Maynard for the federal Offense of Racketeering involving a bribery scheme in El Paso Municipal Court" (*R V 100-101*). One can hardly accuse trial counsel for laying behind the log at trial on this issue.

2. ***Demonstration Of Probable Exposure:***

This case generated little if any *pre-trial* publicity; as the Fifth Circuit conceded that "no one" [of the voir dire panel] indicated that they had even heard of the case. Indeed this case would have probably generated little *mid-trial publicity* except for the fact that one of the

defense attorneys was a former County Attorney for El Paso; and except for the fact that the testimony at trial linked this prominent political figure to the conspiracy itself, (*R V 114-120*). For example, one front page headline read: "*Witness: Ex-County Attorney Was At Drug Deal,*" (*R V 114*).

In regard to exposure, *Herring* indicated that if "the material was published in a relatively obscure manner – say in an out-of-town newspaper – one would expect that the material had not reached the jury," *Herring*, 568 F.2d 1099. The *Herring* Court found the following sufficient to raise the likelihood of exposure:

> Third, the headlines, photograph, and article appeared on the front page of Macon's leading morning newspaper. Since the jury in this case was not sequestered, it would defy common sense to suppose that not a single member of the jury had at least glanced at the headline and photograph; as we have previously recounted, these items appeared in the most conspicuous area of the *Telegraph's* front page.
>
> ***Herring*, 568 F.2d at 1103.**

Similarly, in *Williams*, the Fifth Circuit found that one front page article in a local paper, *Williams*, 809 F.2d at 1091, raised the "likelihood" of exposure because it was obvious that the material was "not published in an obscure way," *Williams*, 809 F.2d at 1092.

In our case, the Fifth Circuit concedes that "from December 1 . . . through December 15, 1987, a blitz of newspaper articles appeared on the front pages of the El Paso and Juarez newspapers . . . located in [display] vending machines throughout the downtown area and

surrounding the courthouse," [Emphasis supplied], *Arzola,* 867 F.2d at 1513.

3. ***Prejudicial Nature Of The Publicity:***

The Petitioners presented to the Fifth Circuit direct examples of prejudicial publicity which were both (1) off-the-record, and; (2) repeatedly published. The Petitioners will again describe these articles herein.

a. *Petitioner Arzola-Amaya.* The Petitioner Arzola-Amaya was prominently mentioned in every article of the *"blitz"*. However, on December 2, 1987, the article of the *El Paso Herald-Post* beginning on the front page specifically referred to the off-the-record fact that the Petitioner Arzola-Amaya had been previously convicted of a Federal drug offense (*See Articles, Appendix: Exhibit E, R V 112 et seq*). The following specific reference in the December 2, 1987 El Paso Herald-Post was made to Petitioner Arzola's prior drug conviction which were not admitted during his trial:

> Court records show that Arzola-Amaya, an illegal alien from the state of Durango, Mexico, was arrested in the El Paso area in 1976 while smuggling 1,200 pounds of marijuana. He was given a reduced sentence after pleading guilty and served about two years in a federal penitentiary.
>
> **(R I 147)**

The evidence was never presented at trial.

b. *Petitioner Maynard.* On December 9, 1987, Petitioner Maynard "made the headlines," with the *El Paso Herald-Post* headline reading "former cop accused of bribery," (*See Articles, Appendix: E, R V 112 et seq*). Within this

article, located squarely on the front page, was the following:

> Maynard, who resigned from the El Paso Police Department in 1978 and later was convicted in a traffic ticket fixing scheme, is one of six defendants.
>
> ***El Paso Herald-Post*, (Dec. 9, 1987)**

This off-the-record information had earlier been published in an article beginning on the front page in the *El Paso Herald-Post* on December 2, 1987:

> Maynard, who retired from the El Paso Police Department in 1978 and was later convicted of racketeering in a traffic ticket fixing scheme, also is a defendant in the trial.
>
> ***El Paso Herald-Post*, (Dec. 2, 1987) (R V 112 et seq)**

Again, this evidence was never presented at trial.

c. *Petitioner Humberto Salazar.* This Petitioner was subjected to a barrage of off-the-record allegations, which appeared in numerous front pages, that he was a Colombian national.

The defendants include . . . Jorge Humberto Salazar, 31, and Edison Alvarez, 22, both thought to be Colombian nationals," *El Paso Herald-Post* (Dec. 1, 1987), (*R I 144-45*). The others are . . . Jorge Humberto Salazar, 31, and Edison Alvarez, 22. Salazar and Alvarez are Colombian nationals," *El Paso Times* (Dec. 3, 1987), (*R I 150*); "The defendants include . . . Jorge Humberto Salazar, 31, and Edison Alvarez, 22, both thought to be Colombian nationals," *El Paso Herald-Post* (Dec. 2, 1987), (*R I 151-52*); "Other defendants are . . . Jorge Humberto Salazar, 31, and Edison Alvarez, 22, both Colombian nationals," *El Paso Times* (Dec. 9, 1987), (*R I 161*); On trial with Arzola

are . . . Jorge Humberto Salazar, 31, and Edison Alvarez, 22, both Colombian nationals," *El Paso Times* (Dec. 9, 1987), (*R I 164*); "Other defendants are . . . Jorge Humberto Salazar, 31, and Edison Alvarez, 22, both Colombian nationals," *El Paso Times* (Dec. 11, 1987), (*R I 165*). This information to the effect that the Petitioner was a "Colombian national" was not supported by any testimony and was the subject of Motions in Limine by trial Defense Counsel. Since Colombia is thought to be the virtual drug capital of the world and source of most if not all cocaine imported into the United States, the allegation that the Petitioner was a Colombian national was thought to be highly damaging thus explaining the strenuous efforts of trial defense counsel to exclude this issue from trial. However, the constant refrain of this "evidence" in the press virtually insured that the unsequestered jury was exposed to this highly damaging evidence, thus insuring that the efforts of trial defense counsel to exclude such evidence would be frustrated.

d. *Petitioner Santiago-Rosas*. This Petitioner was prejudiced in a more general manner by off-the-record evidence which tended to support key areas of the prosecution case. This publicity which included headlines naming Anchondo as a participant in the events and accompanied by pictures of Anchondo tended to "tar" all defendants and all counsel. The extraneous offenses of Attorney Anchondo, which were off-the-record, tended to add a large amount of credibility to the government witnesses and their allegations. (*For example, see R I 146-47, R I 148-49*) *** The political prominence of Anchondo, who was a former County Attorney, and narrow unsuccessful District Attorney Candidate as well as

Congressional Candidate made the new allegations coupled with the old allegations even more inflammatory. In addition, industrious journalists often sought out off-the-record information which tended to support the testimony of various government witnesses as well as tie the defendants to extraneous offenses never introduced or even alleged in court. (*For example, see R I 157-58*).

In regard to the two Petitioners whose prior convictions were revealed not in trial, but in repeated articles during the "blitz," the Fourth Circuit held:

> The authorities have marked out fairly clearly what is substantial prejudicial material and what is not, or, as one court has phrased it, the "degree of prejudice [which] must be shown to trigger the court's responsibility to investigate further [in-trial publicity] by specifically questioning the jury* * *." *United States v. Thomas* (7th Cir. 1972), 463 F.2d 1061, 1063. With hardly an exception, the cases in which substantial prejudicial publicity during trial was found, the publicity involved "information about the defendant that would not be admissible before the jury or that was not in fact put before the jury in court," *United States v. Hyde* (5th Cir. 1971), 448 F.2d 815, 849, cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972). This was true in *Marshall v. United States* (1959), 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250, where the assailed publicity consisted of information with reference to prior convictions of the defendant and his wife and was "information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence.
>
> ***United States v. Jones,***
> **542 F.2d 186 (4th Cir. 1986)**

A Fifth Circuit case has held that off-the-record or inadmissible evidence of a prior conviction is prejudicial,

"persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced," *U.S. v. Williams*, 568 F.2d 464, 468 (5th Cir. 1978). In this case, the prior convictions were inadmissible because either Petitioner Arzola nor Petitioner Maynard took the stand. As the Seventh Circuit held in *United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972):

> This circuit has specifically defined minimal measures a district judge is required to take when confronted with evidence of prejudicial publicity prior to and during a trial. Thus, when apprised in a general fashion of the existence of damaging publicity, the district judge is only called upon to "strongly and repeatedly [admonish] the jury throughout the trial to read or listen to any news coverage of the case." *Margoles v. United States*, supra at 733. When the publishing of *specific examples of inadmissible evidence* is brought to the court's attention, further investigation is required to determine juror exposure of it;***(Italics added)
>
> It is accordingly the publication of *"inadmissible evidence"* that will normally trigger any requirement of specific juror inquiry; absent such situation, a general admonition to the jury is considered sufficient.
>
> ***Thomas*, 463 F.2d at 1063**

The Petitioner Salazar was prejudiced by the incessantly repetitive reference to his being a Colombian national which was not introduced at trial. The Petitioner Rosas was prejudiced by association and by the general buttressing of the Government's entire case through investigation and reporting of off-the-record information. Since the requirement to poll was clearly triggered by the references to the prior convictions of the Petitioners Maynard and Arzola, Counsel argues that these Petitioners were entitled to the polling as well.

4. *Summary:*

In summary, the Petitioners below established a strong case of probable jury exposure to mid-trial publicity and also established that the articles contained off-the-record or inadmissible information such as prior convictions which was prejudicial to the Petitioners. For these reasons, upon the granting of a writ of certiorari, these Petitioners should prevail on the merits.

CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioners pray that this Court grant a Petition for Certiorari to the United States Supreme Court and thereafter reverse the judgment and sentence entered below, and to remand this cause for a new trial.

Respectfully submitted,

CHARLES LOUIS ROBERTS
Attorney for Petitioner
Texas Bar No. 17000100
123 Mills, Suite 306
El Paso, Texas 79901
(915) 532-5475

EARL HANSON
Attorney for Petitioner
205 S. Broadway
Suite 902
Los Angeles, CA
(213) 626-6831

LUIS E. ISLAS
Attorney for Petitioner
Texas Bar No. 10435300
2915 Wyoming
El Paso, TX 79902
(915) 562-7111

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1108

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

AUDELIO ARZOLA-AMAYA, SANTIAGO ROSAS-ARZOLA, EDWARD V. MAYNARD, EDISON ALVAREZ, JORGE HUMBERTO SALAZAR and JESUS ESTRADA-HERNANDEZ,
Defendants-Appellants

Appeals from the United States District Court
for the Eastern District of Louisiana

(March 8, 1989)

Before POLITZ and JOLLY, Circuit Judges, and HUNTER*, District Judge.

EDWIN F. HUNTER, JR., District Judge:

On September 16, 1988, the grand jury for the El Paso Division of the Western District of Texas returned a

---

* District Judge of the Western District of Louisiana, sitting by designation.

superseding indictment charging Audelio Arzola-Amaya ("Arzola-Amaya") as a principal administrator, organizer, and the leader of a continuing criminal enterprise, in violation of 21 U.S.C. § 848(b). In addition, all six Appellants, Arzola-Amaya, Santiago Rosas-Arzola ("Rosas-Arzola"), Edward V. Maynard, Edison Alvarez, Jorge Humberto Salazar, and Jesus Estrada-Hernandez ("Estrada-Hernandez") were charged with conspiracy to possess a quantity of cocaine in excess of five kilograms with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 2), and with the sustantive offense of possession of cocaine with intent to distribute. Appellants Arzola-Amaya, Rosas-Arzola, Alvarez, Salazar and Estrada-Hernandez were also charged with conspiracy to possess marijuana with intent to distribute, as well as the substantive offense of possession of marijuana.

Arzola-Amaya was also charged with subscribing to a false tax return in violation of 26 U.S.C. § 7206(1) (Counts 17, 18 and 19).

All six Appellants were tried together. Each was convicted and sentenced as follows:

> Arzola-Amaya, convicted on 18 counts: conducting a continuing criminal enterprise; possession of cocaine with intent to distribute; conspiracy to possess marijuana with intent to distribute; possession of marijuana with intent to distribute; and subscribing to a false income tax return, for a net sentence of life imprisonment, a fine of $1,000,000 and $450 in assessments.
>
> Rosas-Arzola, convicted of conspiracy to possess in excess of five kilograms of cocaine, for which he received a term of imprisonment of seven years and a $50 assessment.

Maynard, convicted on one count of conspiracy to possess in excess of five kilograms of cocaine, for which he received a term of imprisonment of ten years and a $50 assessment.

Alvarez, convicted of possession of more than five kilograms of cocaine with intent to distribute and possession of marijuana with intent to distribute, for a net sentence of 15 years imprisonment followed by a 5 year special parole term and $100 in assessments.

Salazar, convicted of possession of more than 5 kilograms of cocaine with intent to distribute and possession of marijuana with intent to distribute, for a net sentence of 15 years imprisonment followed by a special parole term of 5 years and $100 in assessments.

Estrada-Hernandez, convicted of conspiracy to possess in excess of 5 kilograms of cocaine; possession of more than 5 kilograms of cocaine with intent to distribute; conspiracy to possess marijuana with intent to distribute; and possession of marijuana with intent to distribute, for a net sentence of 15 years imprisonment followed by a 5 year special parole term and $400 in assessments.

On appeal, each raises myriad grounds for reversal. After examining all of their arguments, however, we find no cause to reverse their convictions and therefore affirm the trial court's judgment.

THE "ORGANIZATION"-AN OVERVIEW

The indictment and convictions of Appellants arose from the activities of the Audelio Arzola-Amaya drug trafficking organization. The evidence reveals that during the period of time (1980 through 1987), Arzola-Amaya's trafficking of cocaine and marijuana grew from a small

one man enterprise into a very large organization, international in scope. Cocaine was its primary commodity. Cash was its main staple. Arzola-Amaya's participation went from cocaine source for street dealers to chief executive officer of a multi-national operation, distributing over 500 kilos of cocaine a month at the time of his arrest.

The government's case included the testimony of Robert Marquez, Albino Renteria, Teresa and William Anchondo, each of whom worked as a cocaine distributor for Arzola-Amaya. Other witnesses corroborated the details of their testimony. The June 1987 Montoya Street incident which the trial judge described as "one of those coincidences that would seem too far fetched if used in fiction"-removed all doubts as to the enterprise and the major participants.

Unfortunately for appellants, the intricate web of illegal activity engaged in by the Arzola-Amaya drug trafficking organization began to unfold in October and November of 1985 when Robert Marquez, an unindicted co-conspirator, contacted the Drug Enforcement Administration ("DEA") by letter from his cell in a Texas Department of Corrections Prison, relating information he possessed. He had been incarcerated following his conviction and sentencing in July of 1985 for delivery of cocaine. The source of this cocaine was Arzola-Amaya. After reading in the newspaper about two large cocaine seizures, and being motivated by fear of further implication in the activities of the Arzola-Amaya organization, Marquez met with DEA agents and informed them that the cocaine confiscated in these seizures belonged to the Arzola-Amaya organization which was "moving" 500 kilos of cocaine a month. Marquez had been associated

with Arzola-Amaya since 1978. He paid Arzola-Amaya between $300,000 and $500,000 for cocaine in 1983 and approximately $500,000 in 1984.

In 1980, co-defendant Albino Renteria[1] worked as a television repairman for his uncle, Thomas Marquez. During this same period of time, while residing in Big Spring, Texas, he worked as a cocaine distributor for Arzola-Amaya. Renteria was initially recruited into the narcotics business by his cousin, Tony Marquez, who introduced him to Arzola-Amaya.

Renteria's role in the organization was to act as a courier.[2] His first two trips involved working directly under Tony Marquez. At that time, it appears that the organization was just getting started. Arzola-Amaya tried to borrow money from Tony Marquez to buy a kilogram of cocaine. Tony Marquez refused to give Arzola-Amaya money; he did not trust him.

Some time later, Tony Marquez again approached Renteria and recruited him to transport cocaine directly for Arzola-Amaya. Renteria and Arzola-Amaya met in El Paso. They discussed Renteria's transporting cocaine. Renteria agreed and Arzola-Amaya gave him a piece of

---

[1] Albino Renteria entered into a plea agreement with the government to plead guilty to Count Sixteen of the superseding indictment.

[2] A courier or a "mule" is an individual in a drug trafficking organization whose primary responsibility is to transport or carry narcotics, money or other things of interest to the organization. Generally, a courier or a "mule" does not establish sources of supply or sell the drug.

paper on which were written his beeper number and the address, "1205 Overland".[3] He was instructed to call upon his return from Miami and to meet again in El Paso.

In 1981, Renteria made his first of many trips to Miami. There, he met Arzola-Amaya's source of cocaine, Colombian drug dealer Armando Ramirez. Ramirez and Renteria wrapped the cocaine and put it in a suitcase with women's clothing. Filling the suitcase with women's clothing was a technique utilized by this group to disassociate the male courier from the cocaine which was secreted inside the suitcase in the event of a seizure or discovery.

Renteria returned to El Paso on the same flight as Ramirez. They sat apart on the plane and never acknowledged one another's presence. They traveled this way so that in the event the courier, Renteria, were arrested, Ramirez would not be associated with him. Once in El Paso, Renteria delivered the cocaine to Arzola-Amaya. The sole basis for the relationship between Renteria and his boss, Amaya, was drug dealing, and Renteria's only involvement in the organization was as a drug courier.

Altogether, Renteria made seven round trips to Miami as a courier for Arzola-Amaya. On these trips, he would generally follow the same modus operandi: take large sums of cash to cocaine sources, Ramirez and later

---

[3] 1205 Overland is the address of a series of small apartments owned by Maynard.

co-defendant German Orozco, in Miami;[4] bring back between one and four kilograms of cocaine, sitting apart from his companion, if any, on the return flights from Miami, and deliver the cocaine to Arzola-Amaya. On one occasion, Arzola-Amaya instructed Renteria to fly to Miami; pick up four kilograms of cocaine; fly back to El Paso; leave two kilograms of cocaine; and take the remaining two kilograms to California. Arzola-Amaya's brother, co-defendant Manuel Rosas Arzola-Amaya, was to sell the two kilograms of cocaine in California for Arzola-Amaya.[5]

About this time, Renteria approached Arzola-Amaya about quitting the organization, but according to his testimony, Arzola-Amaya threatened to kill him if this occurred. Renteria proposed that his sister-in-law, Teresa Anchondo, would be a good candidate to transport drugs in his stead and would take his place. Arzola-Amaya agreed provided Renteria accompanied her on the first trip to Miami. Renteria and Teresa Anchondo made a trip to Miami together in May of 1983 and returned with a suitcase packed with cocaine wrapped in a gauze or fiber glass-like material. The cocaine was delivered to Arzola-Amaya as before. The trip was Renteria's last for Arzola-Amaya, but Teresa Anchondo later made five more trips

---

[4] Usually the courier did not know the exact amount of money he was carrying because the money was often wrapped in black electrical tape. On one occasion, Renteria did learn that he was taking $70,000 to Miami.

[5] Manuel Rosas Arzola-Amaya was indicted with but not tried with these Appellants.

to Miami. Teresa's son, "Willie" Anchondo, was recruited to accompany her on these trips or go in her place when she was unavailable.

Teresa and Willie Anchondo's participation in Arzola-Amaya's organization did not end with these ventures to Miami. In April of 1985, Teresa was contacted by Arzola-Amaya about making the first of two trips from El Paso to Los Angeles, California. Teresa and Willie Anchondo went with Constana, the pilot, to a ranch southeast of El Paso where two pickup trucks were parked. Attached to the pickup trucks were propane tanks filled with cocaine. The Anchondos drove the trucks to Los Angeles, delivered the keys to Arzola-Amaya's brother Manuel Arzola-Amaya, and flew back to El Paso.

On May 19, 1985, Los Angeles Police Department Narcotic officers observed Manuel Arzola and David Candalaria loading cardboard boxes filled with cocaine into a pickup truck. Surveillance agents followed the pickup truck to a house in Pasadena, California. A search warrant was executed, Manuel was arrested, and 528 pounds of cocaine was seized. This was the largest cocaine seizure on record in the Los Angeles area.

A search warrant was then executed at Rosas Electric, and 13 kilograms of cocaine was seized at this location. During the execution of this search warrant, the officers saw a light blue pickup truck in the garage; this pickup truck bore paper Texas license plates and had a large propane tank attached to its bed. The officers attached no signifiance to the pickup truck, and when they returned to investigate further, it was not there. In El Paso, Teresa Anchondo continued waiting and making calls to Arzola-

Amaya's office, finally going to the law office as she had before. There, Teresa saw Maynard, Escalera and a man in a blue suit. The men were talking about a man named "Flores", who was being detained and how they needed more money and a lawyer in New Mexico. Escalera left the office for a short period of time, and when he returned, he was very excited and said, "They have picked up the truck on Santa Fe. . . ."I don't know about you people, but I am leaving. I am going to Mexico."

On July 13, 1985, a pickup truck, driven by Henry Harrison Flores was stopped at the United States Border checkpoint in Almogordo, New Mexico. The pickup truck had a propane tank attached to its bed and bore paper license plates as had been noted regarding trucks carrying prior cocaine shipments. The propane tank was discovered to contain 246 pounds of cocaine. On July 17, 1985, four days later, 263 pounds of cocaine was seized from inside a propane tank attached to the bed of a pickup truck parked at the El Paso residence of Flores. This truck had been purchased by "J. C. Quinones", an alias sometimes used by Arzola-Amaya. The characteristics of both of these seizures were strikingly similar, down to the handwriting on the cocaine packages. Authorities further discovered among Arzola-Amaya's personal effects a receipt for the purchase of two propane tanks; the numbers on the receipt matched the numbers on the attached tank seized from the El Paso residence.

In April of 1986, Teresa Anchondo was contacted by Escalera, who asked her to drive a motor home to California. Teresa and Willie Anchondo then drove the motor home to Andrews, Texas where they spent the night. The next morning the Anchondos drove to a ranch where the

Winnebago was loaded with cocaine, stashed in every conceivable way throughout the motor home. Willie Anchondo estimated the vehicle contained between 1,000 and 2,000 pounds of cocaine. The Anchondos drove the vehicle to Ontario, California. Waiting for them were Arzola-Amaya, Maynard, and Escalera. Rozas-Arzola denies that he was there.

On May 27, 1987 at a United States Border Patrol checkpoint near Yuma, Arizona, $354,000 in cash was seized from a Suburban automobile[6] bound for El Paso from California. Cocaine residue was also discovered in specially modified compartments found in the vehicle. Rosas-Arzola submitted on behalf of Arzola-Amaya and A-Z Productions a "Motion for Mitigation of Forfeiture" for the money seized. Arzola-Amaya claimed the money as his own, and Rosas-Arzola made numerous trips from El Paso to Arizona in regard to this claim.

Arzola-Amaya was under investigation by the El Paso Organized Crime Drug Enforcement Task Force for nearly two years, but it was not until June 1987, when in the words of the Court "by one of those coincidences that would seem too far-fetched if used in fiction," DEA Special Agent David Petz and his wife, sold their house at 5837 Montoya Street in El Paso, Texas to Arzola-Amaya.

On June 17, 1987, a contract to sell the property was entered into between Mrs. Petz and Cham Property, acting for Arzola-Amaya. Appellant Maynard delivered

---

[6] This vehicle was registered to an address in Anthony, New Mexico, that Arzola-Amaya has used.

$40,000 in cash, wrapped in foil. Petz loaned a set of keys to the real estate agent. The keys were given to Maynard.

During the evening of June 22, 1987, and prior to the June 23rd scheduled closing date, Agent Petz and his wife visited the residence on Montoya to make a final inspection and obtain any remaining personal property. In the master bedroom, they found three U-haul cardboard boxes about which they knew nothing. Other than the three U-haul boxes and some cans of black pepper and boxes of corn starch, the house was empty; it did not contain furniture, appliances, or clothing. The Petzes examined the boxes. They discovered several smaller packages wrapped in tape. Believing that these smaller packages might contain a controlled substance, the Petzes immediately left the premises and contacted Ernesto Perez, Resident Agent in Charge of the El Paso DEA office.

The following day, June 23, 1987, before the scheduled closing on the property at 12:00 noon, Agent Petz, along with other DEA agents, returned to the residence to determine whether the packages within the U-haul boxes contained a controlled substance. A sample was taken and upon examination, was found to be cocaine. Twenty-four hour surveillance of the property was initiated and continued for four days.

The sale of the property was finalized. One hour later, surveillance agents observed Arzola-Amaya arrive at the Montoya Street property. He remained for approximately ten minutes, and was observed leaving and talking on a walkie talkie in the front yard. He remained at the scene for a little over an hour, and was followed to his

new residence at 502 Leslie Ward Street in El Paso. Two days later, on June 25, 1987, Estrada-Hernandez was also observed at the residence on Montoya Street. He remained there less than an hour.

On June 26, 1986 Estrada-Hernandez, Alvarez and Salazar arrived at the Montoya property in a pickup truck owned Arzola-Amaya. Estrada-Hernandez was driving. The three men entered the house. Alvarez and Salazar carried U-haul cardboard boxes and a plastic bag into the residence. While Alvarez and Salazar remained inside, Estrada-Hernandez went outside and watered the grass while continuously looking around as though he were conducting "counter surveillance". The three then left the property in Arzola-Amaya's pickup truck, with Estrada-Hernandez driving. They were followed to a gas station near the residence. Estrada-Hernandez made a telephone call. Shortly thereafter, Arzola-Amaya and Rosas-Arzola arrived in Arzola-Amaya's Toyota. Arzola-Amaya transferred to the pickup truck. Alvarez, Salazar and Estrada-Hernandez got into the Toyota with Rosas-Arzola, who was preparing to drive away when all the men were arrested and returned to the Montoya Street residence. A warrant-based and consensual search of the premises was made yielding 415 pounds of cocaine and 19 pounds of marijuana, corn starch boxes, black pepper cans and beer bottles. Salazar's finger prints were found on the boxes and Estrada-Hernandez's on the beer bottles.

THE ISSUES

1. Whether the evidence adduced at trial is sufficient to sustain the convictions of Rosas-Arozla, Maynard, Alvarez, Salazar, and Estrada-Hernandez.

2. Whether the Court erred in denying appellants' motion to have the jury polled regarding trial publicity.

3. Whether Arzola-Amaya's waiver of his conflict-free representation precludes his successful assertion of an ineffective assistance of counsel claim, and whether his co-appellants have any grounds to complain about not being present at the conflict hearing.

4. Whether a mistrial was mandated for Arzola-Amaya because the name of one of his trial counsel came out during the testimony.

5. Whether Rosas-Arzola, Maynard, Alvarez, and Salazar were entitled to a severance.

6. Whether Estrada-Hernandez' right to a speedy trial was violated.

7. Whether there was error in the court's charge on mere presence.

8. Whether Estrada-Hernandez' Fourth Amendment rights were violated in the search of his person and the house located at 5837 Montoya Street in El Paso, Texas.

9. Whether Estrada-Hernandez is entitled to the vacating of three of his four convictions under the "concurrent sentence doctrine."[7]

The Sufficiency of the Evidence

Rosas-Arzola, Maynard, Alvarez, Salazar, and Estrada-Hernandez assert that the evidence adduced at

---

[7] Appellants posit other grounds for reversal, but these lack sufficient merit to justify discussion.

trial was insufficient to support their convictions. When a challenge is made to the sufficiency of the evidence to sustain an appellant's conviction, the question on appeal is whether there is substantial evidence, viewed in the light most favorable to the government, to uphold a jury's guilty verdict. *United States v. Kaufman*, 858 F.2d 994, 999 (5th Cir. 1988); see *United States v. Alvarado Garcia*, 781 F.2d 422, 423 (5th Cir. 1986) citing *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978) and *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). Stated another way, the question is whether a reasonable jury could find the defendants guilty beyond a reasonable doubt. *United States v. Gardea-Carrasco*, 830 F.2d 41, 43 (5th Cir. 1987); *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638. Without restating all the evidence in the "overview", supra, we will review the evidence as to each defendant separately.

A. Rosas-Arzola

To establish Rosas-Arzola's guilt of conspiracy to possess with intent to distribute, as well as the guilt of the remaining appellants as to their own conspiracy indictments, the government must prove beyond a reasonable doubt: (1) the existence of an agreement between two or more persons to violate the narcotics laws; (2) the defendant knew of the conspiracy, and (3) the defendant voluntarily participated in the conspiracy. *United States v. Kaufman*, 858 F.2d 994, 999 (5th Cir. 1988); *United States v. Williams-Hendricks*, 805 F.2d 496, 502 (5th Cir. 1986); *United States v. Littrell*, 574 F.2d 828, 832 (5th Cir. 1978).

Each element of the conspiracy charge must be proved beyond a reasonable doubt. No element need be proved by direct evidence, but may be inferred from circumstantial evidence. An agreement may be inferred from "concert of action." *United States v. Vergara*, 687 F.2d 57, 61 (5th Cir. 1982). Voluntary participation may be inferred from "a collocation of circumstances." *United States v. Espinoza-Seoney*, 822 F.2d 526 (5th Cir. 1988); *United States v. Marx*, 635 F.2d 436, 439 (5th Cir. 1981); *United States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.), *cert denied sub nom. Bertolotti v. United States*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979).

We must first address the argued inconsistency in Rosas-Arzola's conviction of conspiring to possess in excess of five kilograms of cocaine, with intent to distribute, while being cleared of the substantive offenses. In *United States v. Caro*, 569 F.2d 411, 418 (5th Cir. 1978), this court stressed the judicial scrutiny to which such a conflict should be exposed:

> In this case, the jury convicted the defendant on a conspiracy charge while acquitting on the substantive offense. There is nothing necessarily inconsistent, in law or logic, with such a result and we do not hold that a conviction for conspiracy and acquittal of the substantive offense may never properly arise from the same facts and trial. We do suggest however, that such a result should engage our judicial skepticism. A critical analysis of the facts is required when such a contrariety of results does appear.

But see *United States v. Heller*, 625 F.2d 594, 597 (5th. Cir. 1980)

Once we have established the basic contours of the factual situation here we conclude that a rational and fair

minded jury could and did find the defendant guilty of the conspiracy charge while acquitting him on the substantive offenses.

In May of 1985 when Teresa Anchondo returned from a cocaine "delivery" trip to Los Angeles, California, Rosas-Arzola was present at the Montoya Street law office with Arzola-Amaya, Maynard, Escalera, Castana, and an unidentified man. Teresa identified Rosas-Arzola as Santiago indicating her familiarity with him. On approximately June 6th or 7th of 1987, Rosas-Arzola arrived in El Paso. He testified that he made the trip to pick up his ten year old car that had been in a traffic accident six months earlier. He says that he learned much to his chagrin that his vehicle was not ready. He remained in El Paso and contacted Arzola-Amaya at A-Z Productions. Rosas-Arzola visited Arzola-Amaya on five or six occassions at the recording studio. It would be difficult to ignore the fact that while waiting in El Paso, Rosas-Arzola made three trips to Phoenix, Arizona to file claims on behalf of Arzola-Amaya for $354,000. This money had been seized from a vehicle in which agents found cocaine residue 85% pure. The automobile containing the cocaine residue was registered to one of Arzola-Amaya's addresses in El Paso. Appellant's uncorroborated explanation of the reasons for his presence in El Paso is inherently implausible. We have previously indicated that "a less than credible explanation" is part of the overall circumstantial evidence from which knowledge may be inferred. *United States v. Richardson*, 848 F.2d 509, 513 (5th Cir. 1988).

In June of 1987, Rosas-Arzola met Arzola-Amaya's "people" just after they left 415 pounds of cocaine at the

5873 Montoya Street "stash house." He was in an automobile with Arzola-Amaya, and was preparing to drive away at the time of his arrest. His explanation is that he was visiting Arzola-Amaya and just went along for the ride. He asserts, as he must, that he did not know Alvarez, Salazar and Estrada-Hernandez; no introductions were made; he had no idea where he was driving them; or for that matter, he did not even know his way around the city. This explanation could certainly be unpersusive to a reasonable juror in light of other evidence. DEA agent Chris Thompson, testified that it appeared Rosas-Arzola was familiar with Estrada-Hernandez, Salazar and Alvarez. No introductions were made. They appeared to know each other. Then too, we have Teresa Anchondo's testimony that when she delivered a Winnebago loaded with 1,000 to 2,000 pounds of cocaine to Arzola-Amaya in California, a man Teresa identified as Rosas-Arzola was there.

We reiterate – our evaluation of the evidence convinces us that a rational and fair-minded jury could have found RozasArzola guilty of the conspiracy count beyond a reasonable doubt.

B. Maynard

Maynard played an important role in the conspiracy. He had knowledge of most of its activities. He was identified by four of the prosecution's chief witnesses as an important member of the organization. When Marquez received cocaine from Amaya at the Big Spring, Texas airport, he was there. When Renteria delivered cocaine from Miami to El Paso, he was there. Arzola-Amaya told

Renteria and Teresa Anchondo on separate occasions that they would be paid for their courier services as soon as Maynard consummated certain sales. Maynard was the "front man" for the purchase of the Montoya Street "stash house." He tendered $40,000 in cash wrapped in foil to Arzola-Amaya's real estate agent and in return received the keys to the residence. He was observed at the house, alone, on the day before the seizure of 415 pounds of cocaine.

It is eminently clear that Maynard was Arzola-Amaya's close associate in the conspiracy and the evidence certainly was sufficient for a rational jury to find knowledge, intent, and participation beyond a reasonable doubt.

C. Estrada-Hernandez, Alvarez and Salazar

Appellants Estrada-Hernandez, Alvarez, and Salazar contend the evidence against them was not sufficient, and that, as a result, their convictions should be overturned. After reviewing the record, briefs and oral argument, we disagree with this assessment.

Estrada-Hernandez was identified by Arzola-Amaya's secretary as an associate. He was at the Montoya Street "stash house", alone, on the day before the seizure of the 415 pounds of cocaine. On June 26, 1987, Alvarez, Salazar and Estrada-Hernandez arrived at the Montoya property in a Dually pickup truck. The truck was owned by Arzola-Amaya. Estrada-Hernandez was the driver. The three men entered the house. Alvarez and Salazar carried U-haul cardboard boxes and a plastic bag into the

house. Alvarez and Salazar remained inside, Estrada-Hernandez went outside and watered the grass. Alvarez then exited the house, returned to the truck and reentered with a large roll of colored tape. The three left the house, entered the pickup truck and drove away. They were followed to a gas station. Estrada-Hernandez made a telephone: call and shortly thereafter, Arzola-Amaya and Rosas-Arzola appeared on the scene, in Arzola-Amaya's Toyota. Rosas-Arzola was the driver. Arzola-Amaya changed over to the Dually pickup truck. The others changed over to the Toyota which Rosas-Arzola was preparing to drive away when all were arrested and returned to the Montoya residence. The agents executed a search warrant. They discovered 415 pounds of cocaine and 19 pounds of marijuana. Among other items seized were U-haul cardboard boxes, rolls of tape, empty cornstarch boxes and empty cans of black pepper. Salazar's fingerprints were found on a cardboard box which contained cocaine. Estrada-Hernandez' fingerprints were found on beer bottles.

These three appellants have presented no competing version of facts either at trial or on appeal which seriously challenges the sufficiency of the evidence to support their convictions.

Mid-Trial Publicity

Appellants contend on appeal that reversal is required because the District Court improperly denied their repeated requests to poll the jury regarding mid-trial publicity. For several reasons we do not agree. The issue was recently addressed in *United States v. Manzella*, 782 F.2d 533, 541-44 (5th Cir.), *cert. denied sub nom Jimenez*

v. United States, 476 U.S. 1123, 106 S.Ct. 1991, 90 L.Ed.2d 672 (1986). A voir dire should be conducted if "serious questions of possible prejudice" arise. To determine if those questions exist,

> A court must first look at the nature of the news material in question to determine whether it is innately prejudicial; factors such as the timing of the media coverage and its possible effects on legal defenses are to be considered. Second, the court must ascertain the likelihood that the publicity has in fact reached the jury. The prominence of the media coverage and the nature and number of warnings against viewing the coverage become relevant at this state of the inquiry.

Id. at 542 (citing *United States v. Herring*, 568 F.2d 1099, 1105 (5th Cir. 1978).

From December 1, 1987, the first day of the trial, through December 15, 1987, a blitz of newspaper articles appeared on the front pages of the El Paso and Juarez newspapers. Headlines appeared on newspapers located in vending machines throughout the downtown area and surrounding the courthouse.

The *Herring* case on which Appellants rely is easily distinguishable from the case before us. In *Herring*, this court found that the trial court's initial cautionary instruction regarding publicity was *inadequate* in two respects: First, "particular emphasis or detail [was] placed on . . . the . . . publicity problem," and second, "it was . . . arguable that the text of [the] instruction did not explicitly direct the jury to shun any publicity"; the jury members were merely told to "pay no attention" to any publicity. *See Herring*, 568 F.2d at 1101 & n.6.

By comparison, in the case now before the Court, the trial court first inquired of the panel at general voir dire whether anyone had heard anything about the case through the news media. After it learned that no one had, the trial court went on to say, "if it suddenly dawns on you that you have heard about it . . . , well please go ahead and raise your hand and bring it up then."

The trial court's initial precautionary inquiries occurred at general voir dire when the trial court asked:

> Does anyone recall ever having heard anything about this case? In other words have you ever heard about it through the news media, either radio, television, newspapers or whatever, or have you heard about it some other way by someone telling you things or hearing conversations or whatever? If anyone recalls ever having heard anything about the case, please raise your hand at this time. Anyone that remembers ever having heard anything about this case before today, please raise your hand. . . . *If during the course of the questioning it suddenly dawns on you that you have heard about it, that you saw something on television or read a newspaper story or anything like that; well please go ahead and raise your hand and bring it up then.*

Again before the presentation of the evidence began, the trial court cautioned the jury that:

> There may be during the trial . . . publicity about the case in the news media. You are not permitted to read about it in the newspaper and you are not permitted to watch or listen to anything that is broadcast about the trial on television or radio. So please guard your conduct in that regard and don't slip up and find yourself exposed to any kind of news media publicity about the case at a time that you are serving as a juror.

The record reveals that the conduct of this trial was strictly and correctly controlled. An examination of the newspaper articles reveals that for most part, they followed the trial testimony. The trial judge found that "although there was extensive news media coverage of the trial, most of it took the form of reports of the actual trial proceedings, and these matters had occurred in the presence of the jury in the first place."

The cautionary instructions were made on two separate occasions. The judge was very careful and very specific. These collective admonitions concerning media coverage were adequate safeguards to ensure that appellants received a fair trial free from prejudice.

The indictments leveled many counts, some of which resulted in guilty verdicts and others in not guilty verdicts. The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues and reinforces our belief and conclusion that the media coverage did not lead to the deprivation of appellants right to an impartial trial.

CONFLICT OF INTEREST AND THE DISTRICT COURT'S RESOLUTION OF THAT ISSUE

Appellant Arzola-Amaya argues that (a) he was deprived of effective assistance of counsel because of a conflict between him and his trial counsel, Anchondo; (b) the court did not adequately advise him at his conflict of interest hearing of the consequences of a conflict; and (c) the government was obligated to disclose the details of the conflict and did not do so. The other appellants

attempt to capitalize on these arguments, contending that they were prejudiced by Anchondo's continued representation of Arzola-Amaya. However, none of these claims have merit.

The Fifth Amendment guarantees a defendant in a federal criminal trial the right to "counsel reasonably likely to render and rendering" reasonably effective assistance. The guarantee of conflict-free counsel was originally addressed in *Glasser v. United States*, 315 U.S. 60 (1942), where the Supreme Court held that, "the Sixth Amendment contemplates that 'assistance of counsel' be 'untrammeled and unimpaired' by a court order requiring that one lawyer shall simultaneously represent conflicting 'interests.' " *Glasser*, 315 U.S. at 70. The *Glasser* ruling was reaffirmed in *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mere speculation about a conflict, however, is insufficient to establish ineffective representation. *United States v. Soudan*, 812 F.2d 920, 925-26 (5th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 2187, 95 L.Ed.2d 843 (1987); *United States v. Alvarez*, 580 F.2d at 1255 (5th Cir.1978).

Because of the business relationship between Arzola-Amaya and Attorney Anchondo, the government filed a sealed motion asking that an inquiry be made as to potential conflicts of interest. A "conflict hearing" was held on November 23, 1987. Arzola-Amaya, his two attorneys, Esper and Anchondo, were present for this hearing. The district court opined that:

> (1) Appellant Arzola-Amaya understood that there was a potential conflict between him and his attorney, Anchondo, and that his attorney's name might come out during the trial of his case;

(2) Appellant Arzola-Amaya was *positive*" that he wanted Attorney Anchondo to continue to represent him;

(3) Appellant Arzola-Amaya "fully understood and appreciated the [conflict] situation;

(4) Appellant Arzola-Amaya had the opportunity to discuss and did discuss this situation with his attorneys; and

(5) Appellant Arzola-Amaya's decision was conscious and voluntary.

In *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), this Court reversed the trial court, holding that even if a conflict existed, the defendant had a right to waive the disqualification of the attorneys arising from the conflict. The court then outlined the procedure to be followed by a trial court to assure that a defendant's waiver meets constitutional guidelines. The Court likened the procedure to that promulgated in Fed.R.Crim.P.11 whereby a court accepts a defendant's plea of guilty. The Court wrote:

> As in Rule 11 procedures, the district court should address each defendant personally and *forthrightly advise him of the potential dangers of representation by a counsel with a conflict of interest* . . . The court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that *he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict*, that he has discussed the matter with his attorney . . . and that he voluntarily waives his Sixth Amendment protections. (emphasis added).

Arzola-Amaya must show an actual conflict of interest which *prejudiced* his defense. To meet the Sixth

Amendment test, he must demonstrate that his attorney, Anchondo, actively represented conflicting interests in this case, that is – himself and Arzola-Amaya – *and* that this conflict adversely affected Anchondo's performance. *Burger v. Kemp*, ___ U.S. ___, ___, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987).

At trial, Arzola-Amaya was represented by two attorneys – Richard Esper and Anchondo. He does not complain that he was inadequately or ineffectively represented by Esper, who was his lead attorney and handled the examination of the majority of witnesses at trial as well as all communications with the government. Esper argued in summation to the jury. Anchondo did not. Arzola-Amaya informed the court that it was his desire to have Anchondo continue to represent him. He also acknowledged that his attorney's name, "Danny Anchondo," could come out at trial. The trial court found that Arzola-Amaya waived any conflict and fully understood and appreciated the situation. The record fully supports these findings. There is little more than this that the court or the government could have done, short of seeking to remove Attorney Anchondo from the case, against the stated wishes of Arzola-Amaya.

Maynard, Rosas-Arzola, Alvarez and Salazar each complained that they were prejudiced by the trial court's failure to include them in Arzola-Amaya's conflict hearing. During oral argument, the issue of whether these appellants were informed of Arzola-Amaya's relationship with Anchando was vigorously disputed. The supplemental record supports the governments position that appellants certainly should not have been surprised when Anchando's name was mentioned at the trial. They were

on notice of the alleged relationship and fully capable of filing appropriate motions. The supplemental record reveals that appellants *were informed* as to Attorney-Anchondo's relationship with Arzola-Amaya. His name was mentioned *twenty* times in witness Robert Marquez's five-page statement dated March 27, 1987. Then, too, Attorney Anchondo's law office was identified as a meeting place used by members of Arzola-Amaya's organization. (See statement of Teresa Anchondo.) This Jencks Act material was provided to all defense counsel on November 27, 1987, three days before the trial began on November 30, 1987.

Moreover, appellants have not identified any factual basis for the claim of harm or prejudice from the reference to lawyer Anchondo. This contention is meritless absent prejudice.[8] The reference to Anchondo, as made, was relevant and material. And we find nothing in the record demonstrating that the reference hampered any of the complaining counsel in the representation of their clients.

---

[8] Appellants quote as the most damaging portion of Teresa Anchondo's testimony as to Anchondo the following:

Q. Why did you need to get a lawyer in New Mexico?

A. Because this Flores had been arrested.

Q. Had he been arrested – where had he been arrested?

A. At a checkpoint.

Q. So what happens next?

A. Okay, this Felipe leaves the office and is gone for about half an hour. They have papers on top of his desk.

(Continued on following page)

Denial of Motions for Severance

Appellants complain that the trial court erred when it denied their motions for a severance. We disagree. The basis for this contention is not clear. It is apparently pegged on the Anchando connection.

The general rule is that persons who are indicted together should be tried together. *United States v. Harrelson*, 754 F.2d 1153, 1174, *cert. denied*, 474 U.S. 1034, 106 S.Ct. 599, 88 L.Ed 2d. 578 (1985). Denial of a Rule 14 motion for a severance is reviewable only for abuse of discretion. *United States v. Manzella*, 782 F.2d 533, 540. Reversal is warranted only when the appellant can demonstrate compelling prejudice against which the trial court was unable to afford protection. *United States v. Manzella*, 782 F.2d at 540, *United States v. Harrelson*, 754 F.2d at 1174.

(Continued from previous page)

They have-We just all sat there. And then Arzola said to these people, "Now you see why we need Danny (Anchondo) in the District Attorney's office."

Q. Well, let's –

Mr. Roberts: Your Honor, I object and again move for a mistrial on this matter.

The Court: The objection's overruled. She's just relating what went on.

Mr. Hanson: We join in that objection. Mr. Esper: I renew it as well, Your Honor.

The Court: The objections are overruled. Go ahead.

The evidence here was not so complicated as to prevent the jury from separating the evidence and properly applying it only to those against whom it was offered. There was no unfair prejudice which would compel us to disturb the jury's verdict. The trial court, moreover, explicitly instructed the jury to consider each offense separately and each defendant individually. This instruction sufficiently enabled the jury to "compartmentalize" such evidence and prevent any "spillover" from tainting another appellant's case. Certain appellants were convicted of some counts while others were found not guilty, demonstrating that the jury properly followed the judge's instructions. These appellants were not prejudiced by their joinder with Arzola-Amaya.

ESTRADA-HERNANDEZ

Estrada-Hernandez suggests four additional grounds which he argues require setting aside his conviction: (1) his trial did not begin within the time constraints of the Speedy Trial Act, 18 U.S.C. 3161 et seq. (2) the trial court did not utilize the "mere association" charge requested; (3) that certain evidence introduced was the product of an alleged "illegal arrest and seizure" and (4) the concurrent sentences should not be permitted to stand. We address each contention briefly.

(1) Relevant dates in the instant case include July 29, 1987 when Estrada-Hernandez entered a not guilty plea, and November 30, 1987, the trial date. Estrada-Hernandez' filing of his "Motion for Leave to File Supplemental Motion" on August 7, 1987 began a delay which lasted through the motion hearing on September 23, 1987,

and order of October 24, 1987. Only forty-four days of the permissible seventy had elapsed.

(2) We find no merit to the argument that the trial judge erred in not giving the charge that he requested on the "mere association" doctrine. The trial judge did not use the exact language requested, but he clearly, completely and correctly covered this issue in his instructions. We have here a matter of semantics, not substance.

(3) Estrada-Hernandez's convictions were not the product of an "illegal search and seizure and arrest". He refers specifically to the search of the "stash house" at 5837 Montoya Drive in El Paso, Texas and his arrest on June 26, 1987. The burden to prove such a Fourth Amendment violation is upon appellant. *United States v. Parks*, 684 F.2d 1078, 1083 (1982). He must establish that he had a legitimate and reasonable expectation of privacy in the premises which were searched. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). At the risk of belaboring, the obvious, this defendant had no *recognizable* right or interest in the Montoya house. Our analysis could end here, but there is more – there was a valid warrant. As to the arrest-probable cause exists "when the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trust-worthy information are sufficient in themselves to warrant in a person of reasonable caution the belief that an offense has been committed." *U.S. v. Espinoza-Seanez*, 862 F.2d 526 (5th Cir. 1988). *United States v. Tarango-Hinojos*, 791 F.2d 1174, 1176 (5th Cir. 1986), *citing United States v. Woolery*, 670 F.2d 513, 515 (5th Cir. 1982), *cert. denied*, 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75

(1982). The probable cause was more than adequate. No useful purpose would be served by reiterating the circumstances.

(4) Finally, Estrada-Hernandez seeks the vacating of his convictions under Counts 3, 20 and 21 under the so-called concurrent sentencing doctrine. There is no merit to this contention even if we were to assume that the doctrine has continued vitality. *Ray v. United States,* 481 U.S. 736, 107 S.Ct. 2093, 95 L.Ed.2d 693 (1987).

CONCLUSION

We are convinced after careful and exhaustive review of the voluminous record that each defendant received a fair trial.

The convictions and sentences imposed are *AFFIRMED.*

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1108

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUDELIO ARZOLA-AMAYA, SANTIAGO ROSAS-ARZOLA, EDWARD V. MAYNARD, EDISON ALVAREZ, JORGE HUMBERTO SALAZAR and JESUS ESTRADA-HERNANDEZ,

Defendants-Appellants.

Appeals for the United States District Court
for the Western District of Texas

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion March 8, 5 Cir., 1989, ___F.2d___)

(MAY 15, 1989)

Before POLITZ and JOLLY, Circuit Judges, HUNTER*, District Judges

---

* District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

(√) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

(2)

No. 89-78

Supreme Court, U.
FILED
SEP 30
JOSEPH F. SPANIOL
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

AUDELIO ARZOLA-AMAYA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

QUESTION PRESENTED

Whether petitioners' convictions should be reversed because the trial judge did not question the jurors about whether they were exposed to mid-trial publicity.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Greer v. *Miller*, 483 U.S. 756 (1987)	8
Margoles v. *United States*, 407 F.2d 727 (7th Cir.), cert. denied, 396 U.S. 833 (1969)	6
Opper v. *United States*, 348 U.S. 84 (1954)	8
Richardson v. *Marsh*, 481 U.S. 200 (1987)	8
Rizzo v. *United States*, 304 F.2d 810 (8th Cir.), cert. denied, 371 U.S. 890 (1962)	6
United States v. *Attell*, 655 F.2d 703 (5th Cir. 1981)	5
United States v. *Balistrieri* 779 F.2d 1191 (7th Cir. 1985)	7
United States v. *Carrodeguas*, 747 F.2d 1390 (11th Cir. 1984), cert. denied, 474 U.S. 816 1985)	7, 8
United States v. *Gaggi*, 811 F.2d 47 (2d Cir.), cert. denied, 482 U.S. 929 (1987)	5
United States v. *Gray*, 788 F.2d 1031 (4th Cir. 1986)	5
United States v. *Greschner*, 802 F.2d 373 (10th Cir. 1986), cert. denied, 480 U.S. 908 (1987)	8
United States v. *Harrelson*, 754 F.2d 1153 (5th Cir. 1985)	7
United States v. *Herring*, 568 F.2d 1099 (5th Cir. 1978)	5, 7
United States v. *Jones*, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976)	7
United States v. *Manzella*, 782 F.2d 533 (5th Cir.), cert. denied, 476 U.S. 1123 (1986)	5, 6

Cases—Continued: Page

United States v. *Metzger*, 778 F.2d 1195 (6th Cir. 1985), cert. denied, 477 U.S. 906 (1986) 6, 8
United States v. *Perrotta*, 553 F.2d 247 (1st Cir. 1977) 7
United States v. *Porcaro*, 648 F.2d 753 (1st Cir. 1981) 5
United States v. *Trapnell*, 638 F.2d 1016 (7th Cir. 1980) 7

Statutes:

21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 848(b) 2
26 U.S.C. 7206(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-78

AUDELIO ARZOLA-AMAYA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 867 F.2d 1504.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1989. A petition for rehearing was denied on May 15, 1989. Pet. App. 31-32. The petition for a writ of certiorari was filed on July 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner Arzola-Amaya was convicted of conducting a continuing criminal enterprise, 21 U.S.C. 848(b), possessing cocaine with intent to distribute it, 21 U.S.C. 841(a)(1), possessing marijuana with intent to distribute it, 21 U.S.C. 841(a)(1), conspiring to distribute marijuana, 21 U.S.C. 846, and signing a false income tax return, 26 U.S.C. 7206(1). The remaining petitioners were convicted of a variety of narcotics crimes.[1] Petitioner Arzola-Amaya was sentenced to life imprisonment and a fine of $1,000,000; petitioner Rosas-Arzola was sentenced to seven years' imprisonment; petitioner Maynard was sentenced to ten years' imprisonment; and petitioner Salazar was sentenced to 15 years' imprisonment. Pet. App. 2-3.

1. From 1980 to 1987, petitioners were members of a drug organization that sold cocaine and marijuana. Petitioner Arzola-Amaya headed the organization; his source of cocaine was a Colombian drug dealer. During that period, the operation grew from a one-man enterprise into a very large, international organization. At the time of his arrest, Arzola-Amaya was distributing more than 500 kilograms of cocaine a month. Pet. App. 3-4, 6.

2. During voir dire, the trial court asked the panel whether anyone had heard anything about the case through the news media. After ascertaining that no

---

[1] In particular, petitioners Rosas-Arzola and Maynard were convicted of conspiracy to possess cocaine. Petitioner Salazar was convicted of possessing cocaine with intent to distribute it, and possessing marijuana with intent to distribute it. Pet. App. 2-3.

one on the panel had heard anything, the court cautioned the panel (Pet. App. 21):

> If during the course of the questioning, it suddenly dawns on you that you have heard about it, that you saw something on television or read a newspaper story or anything like that; well please go ahead and raise your hand and bring it up then.

The trial court later explicitly instructed the jury to avoid all publicity concerning the case (*ibid.*):

> There may be during the trial . . . publicity about the case in the news media. You are not permitted to read about it in the newspaper and are not permitted to watch or listen to anything that is broadcast about the trial on television or radio. So please guard your conduct in that regard and don't slip up and find yourself exposed to any kind of news media publicity about the case at a time that you are serving as a juror.

During the two-week trial, many articles about the trial appeared in the El Paso, Texas, and Juarez, Mexico, newspapers. Headlines concerning the case appeared in newspapers located in vending machines throughout the downtown area of El Paso and surrounding the courthouse. For the most part, the articles followed the trial testimony. Pet. App. 20, 22. A few of the articles made brief reference to a prior drug conviction of petitioner Arzola-Amaya and a prior racketeering conviction of petitioner Maynard —facts that had not been brought out at trial. Pet. 5, 15-16. Petitioners requested the trial court to poll the jury regarding mid-trial publicity, but the court denied their requests. Pet. App. 19. The court stated that "although there was extensive news media cov-

erage of the trial, most of it took the form of reports of the actual trial proceedings, and these matters had occurred in the presence of the jury in the first place." Pet. App. 22.

The court instructed the jury throughout the trial not to read or listen to any media accounts of the trial, and to take precautions to avoid exposure to any media coverage of the trial. The court repeatedly emphasized the importance of following those instructions. The court explained that it was improper for the jury to consider any information other than that presented in court, and that the jury's verdict had to be based solely on the evidence the court had admitted. See Tr. 10, 48-50, 190-191, 462-463, 708-709, 1022, 1255-1256, 1510, 1774, 2061, 2333, 2614, 2742, 3175. And at a break during deliberations, the court again explicitly instructed the jury: "[D]o not read anything that might be printed in the newspaper or listen to anything or watch anything that might be broadcast or telecast on radio or television concerning this case." Tr. 3353-3354. The jury found petitioners guilty on the charges described above.

3. The court of appeals affirmed. Pet. App. 1-30. The court rejected petitioners' claim that the trial court committed reversible error by denying their requests to question the jury regarding mid-trial publicity. *Id.* at 19-22. The court noted that the conduct of the trial had been "strictly and correctly controlled," and that for the most part the newspaper articles in question followed the trial testimony. *Id.* at 22. The court of appeals found that the "very careful and very specific" cautionary instructions concerning media coverage "were adequate safeguards to ensure that [petitioners] received a fair trial free from prejudice." *Ibid.* The court of ap-

peals also pointed to the jury's acquittal of petitioners on many counts as evidence that petitioners had not been prejudiced by the media coverage. *Ibid.*

ARGUMENT

Petitioners renew their claim (Pet. 5-20) that the district court erred in not asking the jurors whether they disregarded the court's many instructions and read newspaper reports about the trial. That fact-specific contention is without merit.

The Fifth Circuit, acting under its authority to supervise district courts in that circuit, has held that a two-step inquiry is required when publicity about a trial is brought to the district court's attention. First, the district court must determine whether the nature of the material "raises serious questions of possible prejudice." *United States* v. *Herring*, 568 F.2d 1099, 1104 (5th Cir. 1978). That inquiry has two components: The court "must first look at the nature of the news material in question to determine whether it is innately prejudicial"; the court must then "ascertain the likelihood that the publicity has in fact reached the jury." *United States* v. *Manzella*, 782 F.2d 533, 542 (5th Cir.), cert. denied, 476 U.S. 1123 (1986). If the district court finds those two conditions met, then the court must conduct an inquiry to determine whether any jurors have been exposed to the publicity and improperly affected by it. *United States* v. *Attell*, 655 F.2d 703, 705-706 & n.3 (5th Cir. 1981). Such an approach also has been adopted by the First, Second, and Fourth Circuits. See *United States* v. *Gaggi*, 811 F.2d 47, 51 (2d Cir.), cert. denied, 482 U.S. 929 (1982); *United States* v. *Gray*, 788 F.2d 1031, 1032 (4th Cir. 1986); *United States* v. *Porcaro*, 648 F.2d 753, 757 (1st Cir. 1981).

The Sixth Circuit has taken a slightly different—although ultimately consistent—approach to the question of mid-trial publicity. In *United States* v. *Metzger*, 778 F.2d 1195 (1985), cert. denied, 477 U.S. 906 (1986), that court stated that " '[w]here a jury has been clearly admonished not to read newspaper accounts of the trial in which they are serving as jurors, it is not to be presumed that they violated that admonition.' " *Id.* at 1209 (quoting *Rizzo* v. *United States*, 304 F.2d 810, 815 (8th Cir.), cert. denied, 371 U.S. 890 (1962)). The Sixth Circuit accordingly ruled in *Metzger* that the defendant must show a probable violation of the court's instruction not to read newspaper accounts before the court has the duty to question the jurors. 778 F.2d at 1209.

The Sixth Circuit approach is consistent with the law of the other circuits. One component of the inquiry required by the Fifth Circuit is to determine "the likelihood that the publicity has in fact reached the jury." *United States* v. *Manzella*, 782 F.2d at 542. That is the same inquiry directed by the Sixth Circuit in *Metzger*. In every case, the trial court must look to all the circumstances—*e.g.*, "[t]he prominence of the media coverage and the nature and number of warnings against viewing [or reading] the coverage," *United States* v. *Manzella*, 782 F.2d at 542—to decide whether there is a serious risk that the jury was exposed to prejudicial publicity. That is what the court did in this case, and it is what each of the other circuits requires. Accordingly, this case does not raise any conflict in the circuits.[2]

---

[2] The Seventh Circuit in *Margoles* v. *United States*, 407 F.2d 727, 735, cert. denied, 396 U.S. 833 (1969), appeared to adopt a per se rule requiring the trial court to grant a

At bottom, petitioners' disagreement (Pet. 15-19) is with the district court's finding that the newspaper articles at issue in this case did not raise a serious possibility of prejudice.[3] The resolution of that fact-specific question, however, is committed to the discretion of the trial court, with deferential appellate review. See *United States* v. *Carrodeguas*, 747 F.2d 1390, 1395 (11th Cir. 1984), cert. denied, 474 U.S. 816 (1985); *United States* v. *Perrotta*, 553 F.2d 247, 250 (1st Cir. 1977); *United States* v. *Jones*, 542 F.2d 186, 194-195 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

---

defendant's request to ask the jurors whether they were exposed to prejudicial mid-trial publicity. Later cases in that circuit, however, indicate that there is not a per se rule requiring reversal if an inquiry is not made following media reports concerning the trial. See *United States* v. *Balistrieri*, 779 F.2d 1191, 1213-1214 (7th Cir. 1985) ("failure to follow the procedure [set forth in *Margoles*] is not automatically reversible error. * * * The ultimate inquiry is whether there is substantial likelihood that the defendants were denied a fair trial."); *United States* v. *Trapnell*, 638 F.2d 1016, 1022 (7th Cir. 1980) (such an inquiry is required only if the prejudical publicity "may reasonably be believed to have come to the attention of the jurors").

[3] Petitioners mistakenly argue (Pet. 10-11) that the decision below conflicts with prior Fifth Circuit precedent. The Fifth Circuit has consistently held that "the nature and number of warnings against" reading or viewing media coverage are relevant to the question whether there is a serious risk that the jury was exposed to prejudicial publicity. Compare *United States* v. *Harrelson*, 754 F.2d 1153 (5th Cir. 1985) (judge's admonitions were adequate to shield jury from publicity), with *United States* v. *Herring*, *supra* (judge's warnings were inadequate). In this case, the Fifth Circuit reasonably held that the trial court's many instructions were sufficient to minimize the risk that the jury would read prejudicial newspaper articles.

The trial court in this case did not commit reversible error in finding that there was not a serious risk of possible prejudice. The court found that, although there were many newspaper reports about the trial, "most of [them] took the form of reports of the actual proceedings, and these matters had occurred in the presence of the jury." Pet. App. 22. Moreover, the court gave repeated, strict instructions to the jury to avoid all publicity about the case. And the law generally presumes that jurors can and will follow the court's instructions. See *Greer* v. *Miller*, 483 U.S. 756, 766 n.8 (1987); *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987); *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

Petitioners note (Pet. 15-16) that a few of the articles referred to the prior convictions of petitioners Arzola-Amaya and Maynard. Those references, however, were embedded in articles that otherwise merely repeated the trial proceedings.[4] There is no reason to believe that any juror disobeyed the court's instructions, read those articles, and learned of the prior convictions. See *United States* v. *Greschner*, 802 F.2d 373, 381 (10th Cir. 1986) (court cannot presume that jurors disobeyed instructions not to read news accounts), cert. denied, 480 U.S. 908 (1987); *United States* v. *Metzger*, 778 F.2d at 1209; *United States* v. *Carrodeguas*, 747 F.2d at 1395. Accordingly, the trial court did not commit reversible error by not

---

[4] The newspaper reports were even less prejudicial to the other petitioners. Petitioner Salazar contends (Pet. 16) that he was identified as a "Colombian national." And petitioner Santiago-Rosas complains (Pet. 17) about stories concerning his attorney's possible involvement in the conspiracy, a matter that had already been brought out at trial.

highlighting those articles even more by asking the jurors whether they had read them.

Finally, the jury's verdict tends to confirm the trial court's conclusion that petitioners were not prejudiced by the mid-trial publicity. The jury acquitted all the petitioners except Arzola-Amaya on at least one of the counts of the indictment. Thus, as the court of appeals observed, the verdict "indicates a fair minded consideration of the issues and reinforces [the] belief and conclusion that the media coverage did not lead to the deprivation of [petitioners'] right to an impartial trial." Pet. App. 22.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

DEBORAH WATSON
Attorney

SEPTEMBER 1989

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 241699 531